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Are “Human Rights” the “Business of Business”?

KLAUS M. LEISINGER *

Comment to the Contribution of David Weissbrodt

1. Introduction

When the UN Global Compact was introduced in 1999 by Kofi Annan at the World Economic Forum in Davos, companies were asked to embrace, support, and enact, within their sphere of influence, a set of core values in the areas of human rights, labor standards, the environment and since June 2004 also including anti-corruption. Thus any company that pledges support to the Global Compact commits itself to two human rights-related principles:

Businesses should support and respect the protection of internationally proclaimed human rights within their sphere of influence.

Businesses should make sure that they are not complicit in human rights abuses.

What looks at first glance as uncontroversial as “motherhood and apple pie” became the subject of a number of hermeneutical exercises, some of which led to substantial controversy. Above all, the “Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights” were received in a quite Manichaean way.

Informed observers of the global human rights situation were at least surprised that, at a time when horrific abuses of the most fundamental human rights – the right to life and to freedom from bodily harm – are being documented every day from countries known to everyone, interest was being focused on the business community. In addition – and given the effort it took to have the validity of the “Draft UN Norms” encompass not only *transnational corporations* but also “other business enterprises” – suspicion that ideological predispositions played a part in the promotion of these norms could not be ruled out. The fact that some of the most passionate voices in support of the “Draft Norms” came from countries whose human rights record would not receive the approval of Amnesty International did not do much to dispel

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the suspicion that a discharge of state responsibilities and their imposition on the private sector were not part of the agenda.

A rational debate on the subject was also hindered by the fact that a substantial proportion of the past and present contributions to the “human rights and business” discussion continues to consist of *indiscriminate charges* against all multinationals despite the fact that the evidence quoted is always connected to the same historically known worst cases.¹ Last but not least, demands such as for “periodic monitoring” (by the UN and its specialized agencies, for example), country rapporteurs, or thematic procedures of the U.N. Commission on Human Rights, plus other “international mechanisms,” nurtured fears about a newly created and highly politicized “business and human rights” bureaucracy (Osorio 2004). This worry is associated with the notion that the enforcement of law is in many parts of the developing world inexistent at worst, inefficient at best, and as a result a major burden to companies, not the least because they have to deal with corrupt bureaucracies applying it arbitrarily.² And by the way, especially regarding human rights-related issues, simply aiming for legal compliance would not be what large parts of the public expects from a “good” company.

Despite all these worries, work on the “Draft Norms” served from my perspective as a catalyst for a corporate debate on human rights. A group of corporate pragmatists looked at the work done under the chairmanship of the American lawyer David Weissbrodt as valuable input to deepen the understanding and help to operationalize the human rights principles of the Global Compact. A small number of companies, basically those that later participated in the Business Leaders’ Initiative on Human Rights (BLIHR), sought constructively to shape the human rights debate in times of changed roles and values of state and business and tried to put the debate into a business policy context.³ Also, for pragmatic managers the state is and remains the primary guardian of human rights, and the most basic precondition for a satisfactory state of human rights affairs is for governments in their countries to enforce national legislation effectively, so that they comply with internationally agreed standards which they themselves have agreed to formally in many cases but that are often disregarded in practice. Business activities, however, are not taking place in a human rights vacuum. In the spirit of the text of the preamble to the Universal Declaration of Human Rights, which points out that other “organs of society” have human rights-related

¹ See, e.g., those quoted by David Weissbrodt in his paper in this volume; while such examples are no doubt a reason for rage and shame, they can in my judgment not serve as a representative *pro toto* evidence for the corporate human rights record.

² The best book for reference is still Hernando de Soto’s *The Other Path*, published in 1989 by Harper & Row. De Soto shows convincingly how regulation causes damage in particular to small enterprises. Big companies can afford the lawyers to deal with the issues.

³ For details, see www.blihr.org, especially the forthcoming joint BLIHR publication with the Global Compact, *A Guide for Integrating Human Rights into Business Management* (London: 2006); for general Global Compact implementation advice, see Fussler et al. (2004).

duties as well, these companies started to reflect on their actual and perceived human rights obligations.⁴

Given the relatively broad formulation of the two Global Compact principles on human rights, these companies initiated an innovative reflection process: They used the material human rights content of the “Draft Norms” and analyzed their corporate business customary practices with regard to potential divergences or insufficiencies. As all human rights-related demands on corporations are not of the same moral quality, the BLIHR companies differentiated three different degrees of obligation, leaving room for corporate philanthropy. The BLIHR companies initiated a stakeholder debate in order to define what the commitment to “support” and “respect” the protection of internationally proclaimed human rights could mean in practical terms for their companies – and, last but not least, they opened a debate on the meaning of the ambiguous terms “sphere of influence” and “complicity”. Some of them – e.g., Novartis – eventually articulated their understanding of their human rights obligations in corporate human rights guidelines.

2. Where are the tough issues?

For companies competing with integrity, the “business and human rights” debate is not about the basic question of whether or not they have a duty to support and respect the protection of international human rights in their own spheres of influence. No one would seriously maintain that successful business activities are only possible at the expense of human rights. Where the national human rights related legal framework is either not appropriate or not enforced, no “good” company can hide behind “bad” or non-existent law. Enlightened companies will not exploit legal deficits for their benefit but will work voluntarily according to higher standards set by their corporate human rights guidelines.

The real question concerns the concrete way in which a company expresses its belief in human rights. Meaningful answers require not only differentiating between political and civil human rights on the one hand and economic, social, and cultural human rights on the other hand, but also defining the *limits of corporate responsibility* with consideration to a fair societal distribution of obligations (Leisinger 2004).

As far as *political and civil human rights* are concerned – right of defense against state interference in individual freedom – it is in the companies’ own business interests to implement these in their own sphere of influence: for example, tolerating no discrimination, child labor, or forced labor and allowing participative decision-making. Companies seeking legitimacy rather than just legality strive to not benefit from human rights abuses of third parties in their own sphere of influence. This can be done by implementing third-party guidelines that provide – as far as possible – assurances

⁴ The Universal Declaration of Human Rights states in its preamble that “every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.”

through corresponding declarations on the business practices of their customers and suppliers. The precept “do no harm” can be described as the non-negotiable minimum.

The discourse on the corporate respect for *economic, social, and cultural human rights* – positive rights that require material support (in advance) from the state if they are to be upheld – necessitates a clear view of the extent of corporate responsibility in a fair societal distribution of labor. Under “normal” circumstances – that is, in countries that are distinguished by the legitimized exercise of political power, good-quality government, correct policy decisions, rational allocation of resources, law and order, and other elements of “good governance” – companies contribute to the fulfillment of economic, social, and cultural human rights in the framework of their normal business activities. They manufacture products and provide services legally and sell these in the marketplace. To this end, they employ people, compensate them fairly, and pay social security contributions. They purchase goods and pay market prices for these and, *last but not least*, they contribute to the financing of the community by paying taxes. In addition, companies may offer voluntary benefits in the framework of their *corporate citizenship* policy, provide financial support for foundations, make donations, and contribute to the fulfillment of these rights in other ways on a case-by-case basis.

Unfortunately, “circumstances” in many countries are not all that “normal”. The toughest human rights-related challenges for business occur in countries in which the state and its organs are not meeting their responsibilities or where despots arbitrarily and deliberately violate the human rights of their citizens. Another set of issues is posed by “failing markets” – that is, mass poverty that prevents people from acquiring through markets the life-saving products or services they need. Under such circumstances, *some* public interest groups demand that human rights be upheld by other actors of civil society, and they often argue in favor of a “subsidiarity principle,” according to which (transnational!) companies are held to account in such cases. This is where – with good reason – opinions will differ.

3. What can be expected from companies?

Enlightened companies do not define their mission narrowly. Being aware of their responsibilities as corporate citizens, they measure their success more comprehensively than just in terms of quarterly profits. “Business and human rights” has become a prominent subject within the corporate responsibility debate and is likely to gain even more importance in the years to come. Given this, companies are well advised to strive for more than just compliance with national laws in their global business actions. Best practices in the context of “business and human rights” recommend first of all a thorough company internal process of reflection on a number of subjects, including answers to various questions: Where, for example, do practices in our company significantly differ from what fair-minded stakeholders perceive to be legitimate? In what areas do we ourselves see room for improvement and to what extent is this relevant to human rights? They will also explicitly deal with moral and ethical dilemmas and confront them. Answers will vary according to the enlightenment of the management, sector-related specificities, and other factors.

After such a reflection process and after evaluating fair-minded corporate stockholders' points of view, corporate management must define what it perceives the company's obligations to be. Enlightened companies will cooperate in multi-stakeholder dialogues on appropriate definitions of ambiguous terms (e.g., sphere of influence and complicity). In this way, they will not only be preserving their own self-interest, they will also create transparency on the extent of their commitments. Implementation of such guidelines is best done by normal management processes (including target setting, performance appraisals, compliance monitoring, reporting, etc.). It is essential that the corporate human rights record remains clean in the context of the core business – and yet, corporate philanthropy in many ways can play a positive and supportive role.⁵

There is a plausible “business case” for the support and respect of internationally proclaimed human rights, for fair social and environmental standards as well as for a commitment against corruption. These four elements are the very pillars of any relevant corporate responsibility concept. Although there is readily available advice to answer the practical question as to how a company can deal with human rights responsibilities within its business activities, in each and every case the final response to this challenge must be tailor-made for the respective corporation.

For sustainable progress in human development, there is an immense need for collective action of all who can make a contribution. Investing capital, improving productivity, creating employment and thus income, developing human resources, transferring technology and skills as well as empowering people by providing a broad range of products and services: there can be no doubt that the private sector can play an important role in achieving the Millennium Development Goals.⁶ Obviously the corporate contribution depends to a large extent on the leadership model practiced – that is, on the ability to listen to and learn from diverse constituencies, on the courage to confront dilemmas and deal with conflicting values, and on management personalities that are enriched, not overwhelmed, by diversity and complexity (McGaw 2005).

The complexity of human rights and business endeavors can be shown, for example, by its employment dimension. Beyond the obvious essentials such as eliminating forced and child labor, an enlightened approach will include attention to the issues of a living wage, promotion of the right to equality of opportunity, the right to work in healthy and safe working conditions, and improving the employability of working poor – to mention just a few. Dealing with such issues will not only help people in the developing world, it will also enrich the corporate mind set and increase institutional social competence.

Consequently, corporate management can be a force for good in many respects (Birkinshaw/Piramal 2005). The most crucial precondition for all this is that corporate successes are not achieved with collateral human rights damages. My vision is that corporations competing with integrity enter a new, additional dimension of competi-

⁵ See, e.g., www.novartisfoundation.com.

⁶ See, e.g., Commission on the Private Sector and Development, *Unleashing Entrepreneurship – Making Business Work for the Poor*, Report to the Secretary-General of the United Nations (New York: 2004); Witte/Reinicke (2005).

tion about leadership in responsibility. There are signs that those who “care” are starting to win on the financial markets.⁷ My hope is that civil society and the media will increasingly and publicly differentiate their judgments on multinational corporations and will provide reputation capital to those that have a measurably superior corporate responsibility record.

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⁷ The Global Compact, *Who Cares Wins. Connecting Financial Markets to a Changing World* (New York: 2004); see also International Finance Corporation/The Global Compact, *“Who Cares Wins”: One Year On* (forthcoming).